ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CA07-576

MARCH 5, 2008

BILLY T. DICKENS APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. E2000-238]
V.	HON. DAVID REYNOLDS, JUDGE
RUTH DICKENS ROSEN APPELLEE	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

This case involves the modification of a noncustodial parent's visitation rights in conjunction with the custodial parent's relocation to Montana. Appellant Billy T. Dickens, the noncustodial parent, contends that the trial court clearly erred by restricting his visitation and by requiring him to pay all transportation costs associated with the visitation. We affirm the visitation schedule fixed by the trial court, but we reverse as to the allocation of expenses incurred by appellant in connection with his exercise of such visitation, and we remand to the trial court for the entry of an order consistent with this opinion.[1]

[1]We direct both parties to the briefing requirements of Rule 4-2(a) of the Arkansas Rules of the Supreme Court, such as designating in the table of authorities the page numbers on which those authorities appear, omitting argument from the statement of the case, referring in the argument portion to page numbers of the abstract, and indexing the contents of the Addendum.

Although the relocation occurred six years after the divorce, events throughout those years are pertinent to the issues now before us. The complaint for divorce by appellee Ruth Dickens (now Rosen) was served on appellant on March 18, 2000. At a temporary hearing on April 4, 2000, which appellant did not attend, appellee was granted temporary custody of the parties' then three-year-old daughter. Appellant was ordered to pay $92 a week in child support and was awarded supervised, daytime visitation on Saturdays, with exchange to take place at the Conway Police Department. Appellee was awarded temporary possession of the marital residence and each party was ordered to pay half of the mortgage payments, insurance, taxes, and other expenses related to maintenance of the property. Appellant was ordered to provide medical insurance coverage for the child and to pay the expenses of the impending birth of the parties' second child.

Appellant (having defaulted to the complaint) did not attend the final divorce hearing on August 13, 2000, and appellee was granted the divorce and child custody by the court's written decree of August 17, 2000. Appellant's permanent child support was set at $92 a week; his visitation, to be supervised by his sister, was set as bi-weekly on Saturdays, with exchange to continue at the Conway Police Department. Appellant was also ordered to telephone appellee and inform her of his intent to exercise his visitation "since he [had] not regularly exercised the visitation granted in the previous Temporary Order."

The court found that appellant was in arrears $1,362 in child support and $1,561.60 in mortgage payments since entry of the temporary order, and he was ordered to pay $2,000 of medical expenses for a miscarriage that appellee had suffered after that date. He was ordered

to pay the balance owed on his car, which was awarded to him, and to repay appellee (for the benefit of her mother) $9,600 that he had borrowed from appellee's mother to purchase the car. He was also ordered to pay half of the parties' $12,000 credit card debt. Appellee was awarded possession of the house and was ordered to pay the mortgage for three years, after which the house was to be sold. Seventy-five percent of the home sale's net proceeds was to be paid to appellee and twenty-five percent to appellant, whose share was to be reduced by any sums of money he owed appellee on account of his failure to pay any debt, child support, medical expenses, or any other payments ordered under the decree to be paid by appellant.

On October 8, 2002, more than two years after entry of the divorce decree, the court granted appellee's petition to sell the house and found that appellant had "failed entirely" to meet his financial obligations imposed by the decree. Finding that appellant had paid no child support, no mortgage payments, no medical expenses, and none of the marital debt (including the money borrowed from appellee's mother to buy his car), the court concluded that he was indebted to appellee in the amount of $39,093.64. Therefore, the court ordered that appellant's twenty-five percent interest in the proceeds of the sale (approximately $5,275) be applied as an offset against his indebtedness to appellee.[2]

Thereafter, the record of this case stood silent for nearly four years. The Office of Child Support Enforcement (OCSE) sought leave to intervene in April 2006, asserting an

[2] Evidence at the divorce hearing established that the $25,000 down payment and most of the monthly mortgage payments on the house had been made by Ruth's mother, and that appellant had paid "almost nothing" on this debt.

action against appellant to collect a child-support arrearage of $12,474 and seeking to have him put in jail.[3] The intervention was allowed and appellant was served on May 8, 2006.

On June 14, 2006, for the first time since the commencement of the divorce action in March 2000, appellant entered an appearance by filing a petition: he asked that appellee be held in contempt for denying or frustrating his visitation rights, and he claimed that he had never received credit for his $5,275.92 equity in the house. Appellee answered and counter-petitioned for contempt against appellant, alleging that he had failed to comply with the financial obligations imposed upon him by the divorce decree.

Before hearings were scheduled on the contempt petitions, appellee filed a petition requesting permission to relocate with the parties' child to Montana: appellee alleged that she had remarried, that she had family ties in Montana, and that her prospects for employment were better in Montana than in Arkansas. Appellant answered, alleging that appellee had systematically and wilfully denied his visitation privileges and that her move was just another attempt to frustrate his visitation rights. He asked for extended visitation appropriate to the relocation and asked that appellee be directed to provide a significant portion of the transportation costs in order to effectuate his visitation. In an order of October 5, 2006, the court found that appellant was $14,464.80 in arrears on his child-support payments.

The contempt and relocation matters were addressed in a single hearing on November 20, 2006, after which the circuit court announced its rulings from the bench. Appellant was

[3] Appellee had become a recipient of Title IV-D benefits and had assigned her child support rights to OCSE.

found in contempt for failure to pay marital debts as ordered in the divorce decree, but the court deferred taking any remedial or punitive action against appellant for his contempt. Against his marital-debt obligation the court allowed a credit of $5,275.91, representing the value of appellant's equity in the marital home. Appellee was found not to be in contempt for her alleged failure to provide or allow visitation, and her motion to relocate to Montana was granted. Observing that there not been "much reasonable, meaningful visitation" in the six years since the divorce, the court stated:

> You know, asking for unsupervised visitation for the entire summer where there has not been any summer visitation in six years makes it a little difficult. Here's what I am going to do: I'm going to provide that there be some visitation between dad and the child between now and the time that you move; that . . . shall be supervised. And those arrangements will be made today before you leave here with counsel present. Phone numbers will be exchanged.
>
> And next summer, Mr. Dickens may travel to Montana and visit with his daughter for a week. And every summer after that, Mr. Dickens will provide air transportation or other transportation and if she's not allowed to travel alone, for someone to go with her and come with her to Arkansas and spend two weeks beginning year after next and increase one week per year thereafter, with Mr. Dickens providing the cost of transportation, since he has not paid any of the debts that he was supposed to already.
>
> Since he has not paid the debts he was supposed to have paid already. I don't see that it wouldn't [sic] be equitable for Ms. Rosen to pay for transportation.

The court also ruled that appellant's current wife would be a satisfactory supervisor of the Montana visits.

The court's oral rulings were set forth by written order of February 13, 2007. The order also included the following holdings:

> [Appellant] may travel and visit the minor child in the state of Montana for holiday visitation upon three weeks' notice to [appellee] of his intention to do so. [Appellant's] wife shall be a satisfactory supervisor of visitation in Montana.
>
> For summer visitation for 2007 [appellant] shall have one week of visitation. For the summer of 2008 [appellant] shall have two weeks of visitation. Summer visitation shall increase one week per year thereafter in this fashion until the standard "Blue Book" visitation is reached, and visitation shall be standard "blue book" visitation thereafter.
>
> The court orders that [appellant] shall bear the expenses associated with transportation for [his] visitation. The court further orders that the minor child shall not fly unaccompanied by one of her parents until after age of 13.

In the appeal now before us, appellant contends that the trial court's decisions on visitation and travel expenses are clearly erroneous. In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial court's findings in this regard unless they are clearly contrary to the preponderance of the evidence. *Henley v. Medlock*, 97 Ark. App. 45, ___ S.W.3d ___ (2006). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id .* Because the question of whether the trial court's findings are clearly against the preponderance of the evidence turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Sharp v. Keeler*, 99 Ark. App. 42, ___ S.W.3d ___ (2007). There are no cases in which the superior position, ability, and opportunity of the trial judge to observe the parties carry as great a weight as those involving minor children. *Id.*

Visitation

Appellant notes that under *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), a noncustodial parent's visitation and communication schedule is a factor to be considered in relocation cases. Appellant complains that the visitation schedule set forth by the trial court and the unlikeliness that appellant will comply with visitation orders make this case different from *Hollandsworth*, where the supreme court observed:

> Appellee [the noncustodial parent] will be able to sustain a visitation and communication schedule with the parties' children. The trial court set forth a visitation schedule suitable for a noncustodial parent; therefore, there is already a guideline set for visitation. Appellant testified that she would be willing to abide by such visitation schedules. The trial court found that both the appellant and appellee would continue to support the children's relationship with the noncustodial parent.

353 Ark. at 486–87, 109 S.W.3d at 664.

Appellant argues that his restricted visitation, particularly a mere week the first summer and two weeks the next, is unjust and will not foster a father/daughter relationship. His argument is unconvincing, particularly because much of it is grounded in his complaint that the trial court should have considered appellee's clear interference with his visitation.

The trial court, in denying appellant's motion for contempt, explicitly rejected his allegations that appellee had systematically and willfully denied or frustrated his visitation. This was an issue that turned on the credibility of witnesses and the weight of the evidence,

and we will not revisit it on appeal.[4] Furthermore, appellant did not exercise the opportunity for visitation that the court award him for the six years that preceded appellee's relocation with their child. We hold that the visitation schedule and conditions set forth by the trial court, made in conjunction with the Montana relocation of appellee and the parties' child, are not clearly against a preponderance of the evidence.

Transportation Costs

Appellant contends that, in light of appellee's past non-compliance with visitation orders, this court should require her to bear some portion of the costs of transportation to ensure her future compliance with the child-visitation schedule. He submits that appellee "will be more inclined" to follow the visitation orders if she is required to invest her own funds for at least a portion of the transportation costs. As authority for his position, he relies in part upon *Rebsamen v. Rebsamen*, 82 Ark. App. 329, 107 S.W.3d 871 (2003), and *Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000).

In *Rebsamen*, *supra*, we noted that there were economic differences between the parties, and we affirmed the trial court's order that the custodial parent should be largely

[4]Appellant also asserts that appellee failed to answer her telephone or to show up for visitation that the attorneys negotiated between the dates of the final hearing and the relocation to Montana. We will not consider these allegations because they appear only in a post-hearing motion for contempt against appellee, filed by appellant on November 28, 2006, and there is no showing that the trial court considered evidence on them. *See General Elec. Credit Auto Lease, Inc. v. Paty*, 29 Ark. App. 30, 776 S.W.2d 829 (1989) (stating that the appellate court will not consider arguments based on matters not contained in the record or reverse a trial judge on facts outside the record).

responsible for the transportation costs of visitation upon her relocation to Virginia. In *Friedrich*, *supra*, the custodial parent had been found in contempt for denial of visitation before she relocated to Dallas, her new job resulted in a pay raise, and the noncustodial parent had previously sought and been awarded expanded visitation: we therefore modified the trial court's order that allocated to the noncustodial parent almost all transportation costs for visitation, holding instead that half of the costs should be borne by the custodial parent.

Unlike in *Freidrich*, *supra*, there is no finding here that appellee is in contempt for interfering with appellant's visitation; as previously noted, the trial court denied appellant's motion that appellee be found in contempt. Further, before appellant sought to relocate with the parties' child to Montana in 2006, six years after their divorce, appellant had no history of significantly exercising his visitation as allowed in the court's orders, or of attempting to enforce those rights through contempt proceedings against appellee. Therefore, we do not consider that *Freidrich* constitutes authority for imposing expenses of transportation on appellee.

In the present case, however, there is some evidence that appellee's relocation to Montana will be economically beneficial to her. Appellee testified that she was a social worker with a master's degree and that she had been offered a very good job in Montana that "pays very well" and will result in a pay raise for her. Appellee also testified that her husband, who had already taken a job in Montana, had received a raise as well. However, we are mindful from the record that, even after application of appellant's $5,275.91 home equity as

a credit on his marital debt, appellant is still indebted to appellee for the considerable marital debts imposed upon him in the divorce decree.[5]

Under the circumstances of this case, we find that the trial court, in allocating to appellant all of the transportation costs associated with the exercise of his visitation, erred by considering appellant's remaining marital indebtedness without considering the economic benefit of the relocation to appellee. We remand this matter to the trial court for reconsideration of transportation costs through equitable allocation assigning appellee a portion thereof in light of both appellee's changed economic situation and appellant's marital indebtedness to her. To accomplish this, the trial court may, in lieu of requiring a cash outlay by appellee in payment of her share of such expenses, provide that her share of such transportation expenses shall be a credit on appellant's marital indebtedness to appellee. In other words, the court may require that the actual cash outlays to be incurred as transportation expenses in connection with the exercise of appellant's child-visitation privileges shall be borne by him, with appellee's portion of such expenses to be applied as a credit on appellant's marital debt to appellee, until such time as such indebtedness is extinguished.

Affirmed in part; reversed and remanded in part.

GLOVER and VAUGHT, JJ., agree.

---

[5] At the November 20, 2006 hearing, appellee testified that the sum of the financial obligations that appellant was ordered to pay, but had not paid, amounted to "about $63,000." However, this figure appears to include a child-support arrearage of approximately $14,000. The trial court found that appellant "hasn't paid a dime" on the marital debt, a finding that appellant does not dispute.